APPELLANT PRO SE:

DAVID L. HOWARD
Gary, Indiana

ATTORNEYS FOR APPELLEE:

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IN THE COURT OF APPEALS OF INDIANA

DAVID L. HOWARD,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A05-0603-CV-144
	)	
U.S. STEEL CORPORATION,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Special Judge
Cause No. 45D10-0412-PL-166

April 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

David Howard appeals the trial court's grant of summary judgment to U.S. Steel. Howard raises two issues, which we revise and restate as whether the trial court erred by granting U.S. Steel's motion for summary judgment.[1] Additionally, U.S. Steel raises one issue, which we restate as whether U.S. Steel is entitled to receive appellate attorney fees due to Howard's substantive and procedural bad faith. We affirm.[2]

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[1] Howard also raises the issue of "[w]hether the trial court further wrongfully excluded evidence such as to deny fundamental due process of of [sic] law by ignoring or refusing to consider the changed and extended discovery cut-off date (continuance) that Honorable Judge pro tem Donald Wruck established by Order dated 14 December 2005." Appellant's Brief at 1. The trial court's December 14, 2005 order states:

> This Court, having received and reviewed [U.S. Steel]'s Motion for Summary Judgment, Memorandum of Law in Support Thereof and Designation of Evidence, and being duly advised in the premises, now sets said Motion for hearing. A hearing will take place on [U.S. Steel]'s Motion for Summary Judgment on the 15th day of February, 2006, at 10:00 o'clock a.m.

Appellant's Brief at 22D. Howard also appears to cite the following portions of the chronological case summary to support his statement:

> 18 01/11/06 Order of 12/14/05: The Court enters ORDER setting hearing on U.S. Steel Corporation's Motion for Summary Judgment on Feb. 15, 2006 at 10:00 a.m. (Copies mld to D. Howard, T. Austgen, C. Greci, C. Davilo and D. Power on 1/11/06; rj).
>
> * * * * *
>
> 20 11/21/05 Plnt app in pers pro se; Deft US Steel app by J. Greco for PTC. Plnt's Mtn to Postpone Trial denied. Mtn regarding duplication of Exhibits attached to Resp to MSJ granted w/o obj. MSJ set for hearing on 2/15/06 at 10:00 a.m. PTC to be conducted contemporaneously.
>
> 21 11/21/05 Mail Plaintiff David Howard files Motion to Postpone Trial and Response to the Motion for Summary Judgment, with Exhibits attached.

Appellant's Appendix at 3A. Based on the record, we conclude that the trial court did not extend the discovery deadline.

[2] We direct Howard's attention to Ind. Appellate Rule 51(C), which requires that "[a]ll pages of

On August 30, 2004, Howard filed a complaint against U.S. Steel.[3] The complaint alleged in part:[4]

* * * * *

> 6. On Tuesday night, 17 August 2004 from approximately 10:45 p.m. until approximately 11:15 p.m., and early Sunday morning, 1 August 2004 from approximately 2:00 a.m. until approximately 4:00 a.m., unusually, disturbingly loud, crashing, targeted sounds harassed me in particular as said sounds emanated from the US Steel Gary Works plant. AFFIDAVITS A1 – A4.
> 7. Same 17 August 2004 night-time and 1 August 2004 early morning sounds occurred suddenly as I began employment-related writing, and same sounds occurred with callous, malicious disregard for the peace of my neighborhood.
> 8. Early Tuesday morning, 22 June 2004 from approximately 2:00 a.m. until approximately 5:00 a.m., and early Friday morning, 18 June 2004 from approximately 1:30 a.m. until approximately 4:30 a.m., and early Thursday morning, 22 April 2004 from approximately 2:30 a.m. until approximately 6:30 a.m., unusually, disturbingly loud, crashing, targeted sounds harassed me in particular as said

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the Appendix shall be numbered at the bottom consecutively, without obscuring the Transcript page numbers." While some of the pages are numbered, many are not or are out of order. The page numbers used in this opinion that reference the Appellant's Appendix are those that appear on those pages as numbered by Howard. Further, the table of contents in the Appellant's Reply Appendix indicates that documents appear at pages 15, 16, and 17, but the appendix is only fourteen pages long.

We remind Howard that Ind. Appellate Rule 46(A)(6) provides that the statement of facts "shall describe the facts relevant to the issues presented for review but need not repeat what is in the statement of case." The statement of facts "shall be in narrative form and shall not be a witness by witness summary of the testimony." Ind. Appellate Rule 46(A)(6)(c). Howard's statement of facts merely reiterates his statement of the case and fails to provide a narrative of the facts relevant for review.

[3] The complaint also listed "THE WALT DISNEY COMPANY," "GENERAL ELECTRIC COMPANY," "VIACOM, Incorporated," and "FEDERAL AVIATION ADMINISTRATION" as defendants. Appellee's Appendix at 15. The Walt Disney Company, General Electric, and Viacom, Inc. filed a motion to dismiss, which was granted, and they are not involved in this appeal. The Federal Aviation Administration is not a part of this appeal.

[4] Howard does not include a copy of the complaint in either of his appendices. U.S. Steel includes what appears to be only a portion of Howard's complaint in its Appellee's Appendix.

sounds emanated from the US Steel Gary Works plant. AFFIDAVITS A6 – A11

9. Same 22 June 2004, 18 June 2004, and 22 April 2004 sounds occurred suddenly as I began employment-related writing, and said sounds occurred with callous, malicious disregard for the peace of my neighborhood.

10. On Saturday evening, 1 May 2004 from approximately 6:45 p.m. until approximately 7:30 p.m., and on Saturday evening 20 March 2004 from approximately 7:00 p.m. until approximately 7:20 p.m., and on 4 February 2004 from approximately 9:00 p.m. until approximately 9:30 p.m., same loud targeted sounds occurred suddenly as I prepared to enter my residence after I returned from out-of-town business, and same sounds occurred with callous, malicious, disregard for the peace of my neighborhood. AFFIDAVITS A12 – AAA13

11. During, at minimum, the past five years, unusually, disturbingly loud, crashing, same said targeted sounds have come from and from around the US Steel Gary Works plant, and said US Steel targeted sounds, occurring at no other time, (emphasis added),[5] have been targeted at myself and at my neighborhood.

12. US Steel et al illegally agreed to go in disguise by means of one or more satellite and other invasive technologies, and to fix-focus said technologies upon myself ad hominem twenty-four hours per day.

13. US Steel et al illegally agreed to go further in disguise by masking and concealing said ad hominem injury, supra, paragraph 12, in the form of, e.g., the above-described US Steel targeted sounds, aircraft nuisance (including loud, low-flying flights involving US Steel personnel), railroad railcar noise, vehicular threats and harassment on local and on interstate roads and, among other wrongs or crimes, the invasive, defamatory media of Defendants et al.

14. I hereby invoke the doctrine: RES IPSA LOQUITOR: US Steel et al disguise the invasion of my privacy according to the caprice of US Steel et al malice and by means well within the control or knowledge of US Steel et al.

B. FOR THE PURPOSE OF DEPRIVING ME AS AN AFRICAN AMERICAN, INVIDIUOSLY SELECT PERSONS WITH WHOM

[5] Parenthetical appears in original.

I COME INTO CONTACT, AND AFRICAN AMERICANS AS A GROUP, OF EQUAL PROTECTION OF THE LAWS, OR EQUAL PRIVILEGES AND IMMUNITIES UNDER THE LAWS.

15. US Steel et al illegally agreed to use same invasive technology disguises in order to Take [sic] my property, force me into poverty, injure my business, and lower me in the estimation of family, friends, and society, so as to make me the 'scapegoat' shill, or victim of no resort.
16. I, Plaintiff, am an African American (black) citizen of the State of Indiana.
17. I am a music instructor as well as a professional musician, concert violinist, comppser [sic], and percussionist. I am a member of the American Federation of Musicians (local 10-208), and I am a writer/composer member of ASCAP (American Society of Composers and Publishers). I am fluent in the Spanish language and in the French language.
18. I am a graduate cum laude, year 1977, of Harvard College; I attended Georgetown University Law Center from years 1978 to 1980: I did not take a Georgetown degree: I became precisely aware of the possibility of some type of racially invidious agreement after I challenged a Georgetown numerical admissions standard that effectively placed African American students in a separate, prejudicially remedial law school curriculum. See, Civil Action (80-1099, USDC D.C.).
19. From years 1978-1982, I was employed at the U.S. Capitol building at a legislative agency named Architect of the U.S. Capitol, Washington, D.C.: I worked part-time while attending Georgetown Law Center, having gained said employment with the assistance of the late Adam Benjamin, Jr., Congressman, First District, Indiana, who fell dead suddenly and mysteriously in Washington, D.C. within two months subsequent to my summary dismissal from Architect of the U.S. Capitol employment, in year 1982.

C. BY US STEEL et al OVERT ACTS DONE IN FURTHERANCE, CAUSING INJURY TO MY PERSON AND PROPERTY AND DEPRIVING ME OF THE RIGHTS AND PRIVILEGES OF U.S. CITIZENSHIP:

20. I hereby incorporate by reference, COMPLAINT paragraphs 1 through 13, supra, Same [sic] US Steel targeted sounds and

analogous nuisance are overt acts in furtherance of the US Steel et al illegal agreement.

21. As a result, direct and indirect, of the invasion of privacy and stalking inflicted upon me due to US Steel technology abuses, my residence, 929 East 16th Avenue, Gary, Indiana, was burglarized on 16 September 1999.

22. During same 16 September 1999 burglary, supra, paragraph 21, I narrowly avoided a face-to-face confrontation with the armed assailant-burglar: US Steel, directly and indirectly as a result of US Steel et al technology abuses, abetted said assailant-burglar in the knowing of not only my travel schedule, but also of whether I had locked all three of the locks that secure my front door. See, AFFIDAVITS: AA14 – AAA14

23. Similarly, US steel caused or aided or abetted, directly and indirectly, the 15 November 1997 burglary of my same 929 East 16th Avenue, Gary residence. AFFI AAA 14

24. On Saturday evening, 11 January 2003, at approximately 6:30 pm, as soon as I prepared to enter my residence after I returned from out-of-town business, same unusually, disturbingly loud, crashing sounds harassed me in particular as said sounds emanated from the US Steel Gary Works plant.

25. Same 11 January 2003 Saturday evening at approximately 6:30 pm, in addition to the crashing sounds that emanated from US Steel, a series of at least six rounds of live gunfire also occurred, and at least one of said rounds of gunfire appeared to travel toward myself and toward my residence: At least one said round entered the residence of my neighbor, causing substantial damage to said neighbor's residence, and nearly striking same neighbor. See, AFFIDAVITS: AFFIDAVIT 14

26. US Steel causes, aggravates, or abets a permanent, physical occupation of of [sic] my 929 East 16th Avenue, Gary property. US Steel invades my privacy and stalks me. US Steel thereby not only intimidates and adversely prejudices me, but also intimidates and adversely prejudices my family, friends, and business associates during any association with me.

27. On 28 February 2004 at approximately 1:00 am, and on 13 February 2004 at approximately 2:00 am, US Steel caused same invasive, targeted crashing sounds, paragraphs 24, 25, supra, and US Steel caused, aggravated, or abetted a series of gunshots or gunfire incidents as soon as I prepared to retire for bed: Same gunshots or gunfire incidents are targeted at myself and manifest the permanent,

physical occupation of my property such as to suggest 'movie shots.' See, infra, allegations against Defendants et al DISNEY, VIACOM, UNIVERSAL, and GENERAL ELECTRIC/NBC. See, AFFIDAVITS; AA1, A5.

COUNT II FRAUD / RICO COUNT II

18 USC 1343 (Wire Fraud)

28. US Steel knows that some device, implant, scheme, or artifice enables racially or otherwise invidiously select persons to receive transmitted data: US Steel, nonetheless, acted illegally in concert with US Steel et al to exclude me from said transmitted data, and to invade my privacy ad hominem. US Steel aids, abets, and aggravates thereby the marketing of defamatory and invasive media that are based on my suffering under such exclusion.

18 USC 1503 (Obstruction of Justice)

29. US Steel, as Defendant et al in Howard v. Disney et al (USDC ND Ind 2:96cv 108 JM), suggested falsehood and suppressed truth in the 3 June 1996 filed Motion to Dismiss and Memorandum in Support thereof: US Steel knew that the allegations of the Complaint as to US Steel in Howard v. Disney, id., were true and accurate.

18 USC 1961(A) (Attempted Murder)

30. By means of same invasive technologies noted, supra, paragraph 12, US Steel repeatedly knocked me unconscious during my 22 May 2004 travel while I drove my automobile to my residence from a business engagement in a Chicago suburb. US Steel also knocked me unconscious by same invasive technology means, in a 24 May 2004 US Steel attempt to cause and aggravate a household accident. See, AFFIDAVITS A15 – AAA15

18 USC 1951 (Interference with Commerce, Robbery, Extortion)

31. US Steel caused, aided, and abetted the burglaries as alleged supra, paragraphs 21 through 23, and US Steel knows that there are US Steel employees who cause same US Steel noise nuisance, paragraphs 6 through 13, id., and paragraphs 22 through 27, and who

cause same US Steel technology abuse, paragraphs 28 through 30, id.

32. US Steel knows that said such US Steel employees and/or other persons usurp, intrude into, or unlawfully hold or exercise US Steel corporate authority. See, supra, paragraphs 28 and 31. See also, Indiana Code (IC) 34-17-1-1 et seq. US Steel suppresses the truth that US Steel possesses this knowledge.

33. US Steel suppresses the truth that the US Steel et al illegal agreement, supra, paragraphs 12 through 15, is an exercise of authority not conferred upon US Steel by law. See, (IC) 34-17-1-1 et seq, id.

* * * * *

158) WHEREFORE, I, Plaintiff, request the Court grant the following relief:
TOTAL ACTUAL MONETARY DAMAGES: $15,000,000 (Fifteen Million Dollars)

Actual Damages:

159) Actual Damages are $50,000 per year per named Defendant (viz., US STEEL, DISNEY, GENERAL ELECTRIC/UNIVERSAL/NBC, VIACOM, FAA) for each of the at least twenty years of Defendants's [sic] in concert illegal agreement: $50,000 is calculable as the basic, average minimum monetary income that I would have earned but for the crimes and wrongs inflicted upon me by Defendants et al: Therefore, the basis for actual damages is one million dollars per each of the five named Defendants, or five million dollars: 5 x $1,000,000 = $5,000,000.

Treble Damages:

160) The extraordinary daily malice, invidiousness, invasion, wantonness, limitlessness, and systematized abuse ad hominem due to the crimes and wrongs perpetrated by Defendants et al, are definitive under the treble damages mandate or provisions of the Civil Rights Acts, and of the Corrupt Business Influence Acts: Therefore, pursuant to 42 USC 1985(3), 1986, and to 18 USC 1964(c) et seq, and to, Indiana Code (IC) 34-24-2-6 et seq, I request the Court assess or award

against Defendants et al, treble damages in the amount of 3 x $5,000,000, which equals fifteen million dollars: $15,000,000.

Punitive Damages:

161) I, Plaintiff, also request the Court award punitive damages against same Defendants et al: Punitive damages are necessary and required not only as a deterrent to future in concert illegal agreements such as the US Steel et al illegal agreement herein evidenced, but also because Defendants et al: a) defrauded the judicial and legal system; b) abused me with callous, reckless disregard of my health, safety, citizenship, and estate, scheming to isolate me in a permanent state of emergency that always borders on violence; and c) knowingly and seditiously abused the general community and organized state.

EQUITABLE AND OTHER RELIEF:

162) I hereby request the Court enjoin and compel Defendants et al to cease: a) invading my privacy; b) stalking me; c) knocking me unconscious; d) expropriating my person and life for media products; e) targeting me for aircraft nuisance, abusive industrial noise, railcar nuisance, vehicular threats and other threats or assaults on interstate or local roads or Indiana roads; and, f) analogous other harassment or assaults.

Appellee's Appendix at 18-22.

On June 28, 2005, the trial court issued a case management order that stated that "[a]ll discovery shall be completed by Oct 28, 2005." Id. at 1. On November 17, 2005, U.S. Steel filed a motion for summary judgment and argued that Howard did not have any evidence that U.S. Steel was in any way responsible "for the events that form the basis of [Howard]'s complaint." Appellee's Appendix at 7. On November 21, 2005, Howard filed a motion to postpone the trial and a response to U.S. Steel's motion for

summary judgment. On February 15, 2006, the trial court held a hearing[6] on U.S. Steel's motion for summary judgment. Howard made an oral motion to publish depositions, and U.S. Steel objected.[7] That same day, the trial court sustained U.S. Steel's objection to Howard's oral motion to publish depositions, granted U.S. Steel's motion for summary judgment, and denied Howard's motion to postpone the trial as moot.[8] On February 21, 2006, Howard filed a motion to reconsider the grant of summary judgment and attached depositions of Larry Donald and Winford Magee, which occurred in January 2006. The trial court denied Howard's motion to reconsider.

On March 15, 2006, Howard filed a notice of appeal. On May 25, 2006, Howard requested permission to supplement the record on appeal by submitting a deposition of Larry Donald. On September 25, 2006, U.S. Steel filed a motion to file a response to appellant's motion to supplement the record on appeal and a motion to strike portions of the Appellant's Appendix, specifically the depositions of Winford McGee and Larry Donald. On October 24, 2006, U.S. Steel filed a motion to strike portions of Howard's reply brief appendix, specifically the deposition testimony of Bobbie Griffin, James Griffin, Sr., Paul Howard, and Angela Smith, which were executed on October 3, 2006.

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[6] Howard did not request a transcript of the hearing in his notice of appeal.

[7] It is unclear from the record what depositions were involved in Howard's motion to publish depositions. The only reference of this motion is in the trial court's order, which states that "[t]he objection to [Howard]'s oral motion to publish depositions is sustained." Appellant's Appendix at 22A.

[8] Howard does not challenge the trial court's denial of his motion to postpone the trial.

U.S. Steel argued that the Appellant's Appendix contains deposition testimony that was never designated to the trial court in compliance with the requirements of Ind. Trial Rule 56(C). On November 2, 2006, Howard filed a response in opposition of U.S. Steel's motion to strike.

I.

The first issue is whether the trial court erred by granting U.S. Steel's motion for summary judgment. Our standard of review for a trial court's grant of a motion for summary judgment is well settled. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(c); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Mangold, 756 N.E.2d at 973. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court. Id. at 974.

On appeal, Howard only argues that the trial court erred by granting summary judgment on the grounds of his noise nuisance claim against U.S. Steel. Specifically, Howard argues that the trial court "wrongfully excluded evidentiary proof in the five Depositions." Appellant's Brief at 11. U.S. Steel argues that Howard may not rely upon evidence that Howard failed to properly designate to the trial court.

Ind. Trial Rule 56(C) requires a party opposing a motion for summary judgment to designate each material issue of fact relied upon to preclude entry of summary judgment and the evidence relevant thereto. Rosi v. Business Furniture Corp., 615 N.E.2d 431, 434 (Ind. 1993). This court cannot reverse an entry of summary judgment unless the material fact and the evidence relevant thereto were specifically designated to the trial court. Id.; Ind. Trial Rule 56(H).

Based on this standard, we turn to U.S. Steel's motions to strike portions of Howard's appendices. While Howard filed a timely response to U.S. Steel's motion for summary judgment, he only designated a letter dated November 8, 2005, requesting the Indiana Occupational Heath and Safety Administration to provide information regarding noise or safety at U.S. Steel, and a letter dated November 8, 2005, from the Indiana Department of Labor to Howard, which states that they are in the process of filling his request for information. In Howard's briefs on appeal, he cites to depositions that were not timely designated to the trial court.[9] "Like the trial court, we may not look beyond the evidence specifically designated to the trial court." Leasing One Corp. v. Caterpillar Financial Services Corp., 776 N.E.2d 408, 411 (Ind. Ct. App. 2002); see also Rosi, 615 N.E.2d at 435 n.3 (holding that appellant's citation on appeal to portions of the record that were not designated to the trial court in his response to appellee's motion for

[9] We note that Howard did not request an extension of time in which to file his response to U.S. Steel's motion for summary judgment. See Appellee's Appendix at 59-72.

summary judgment were untimely and that Ind. Trial Rule 56(H) prohibits an appellate court from reversing based on evidence not specifically designated to the trial court). Accordingly, we grant U.S. Steel's motions to strike the portions of Howard's appendices that contain depositions that were not properly designated to the trial court. See Thomas v. North Cent. Roofing, 795 N.E.2d 1068, 1071 (Ind. Ct. App. 2003) (holding that this court could not allow a party to file with this court what it apparently failed to file with the trial court and denying party's motion to supplement the record). Thus, we consider only the two letters designated by Howard.[10] See New Albany-Floyd County Educ. Ass'n v. Ammerman, 724 N.E.2d 251, 257 n.11 (holding that reference to evidence attached to a motion to correct error was never designated to the trial court as evidence in support of its summary judgment motion and could not be considered on appeal). The letters only reference a request for information and do not illustrate that a genuine issue

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[10] Howard argues that "pursuant to the Indiana Rules of Evidence, Rule 103(a)(2), said T.R. 53.4 Motion to Reconsider was an additional formal 'offer of proof' to the trial court that genuine issues of material fact exist." Appellant's Brief at 13. Ind. Evidence Rule 103(a)(2) states:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> * * * * *
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.

Howard fails to cite any authority for this proposition and has waived this argument on appeal.

of material fact exists. Thus, the trial court did not err by granting U.S. Steel's motion for summary judgment.

II.

The next issue is whether U.S. Steel is entitled to receive appellate attorney fees due to Howard's substantive and procedural bad faith. Ind. Appellate Rule 66(E) provides that this court "may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Our discretion to award attorney fees is limited to instances when an appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." Orr v. Turco Mfg. Co., Inc., 512 N.E.2d 151, 152 (Ind. 1987). An appellate tribunal must use extreme restraint in exercising its discretionary power to award damages on appeal "because of the potential chilling effect upon the exercise of the right to appeal." Tioga Pines Living Center, Inc. v. Ind. Family & Social Serv. Admin., 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), affirmed on reh'g, trans. denied.

Indiana appellate courts have classified claims for appellate attorney fees into substantive and procedural bad faith claims. Boczar v. Meridian Street Found., 749 N.E.2d 87, 95 (Ind. Ct. App. 2001). To prevail on a substantive bad faith claim, the party must show the appellant's contentions and arguments are utterly void of all plausibility. Id. Substantive bad faith "implies the conscious doing of a wrong because of dishonest

purpose or moral obliquity." Wallace v. Rosen, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002).

Although, as the dissent on the issue of attorney fees indicates, Howard's complaint below is permeated with bizarre allegations, quite unlikely to be true, which could reasonably be characterized as frivolous, his appeal is not about those allegations. His appeal is limited to his claims about an alleged noise nuisance. We will focus on Howard's claims raised in his appeal when considering U.S. Steel's request for appellate attorney fees. See Orr, 512 N.E.2d at 152 (holding that a discretionary award of damages is proper "when *an appeal* is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay") (emphasis added); Klebes v. Forest Lake Corp., 607 N.E.2d 978, 984 (Ind. Ct. App. 1993) (considering an appellee's request for appellate attorney fees for the appellant's malicious and bad faith pursuit of the appeal and holding that a derogatory letter sent by the appellants was written "while the case was still pending at the trial court, not during the appellate process, and thus it is inapplicable to our consideration of the merits of the [appellants'] appeal"), reh'g denied, trans. denied. Howard's arguments were unpersuasive; however, because he supported his claims with pertinent legal authority from which an argument could have been made, we do not find his contentions utterly devoid of all plausibility.[11] See Taflinger Farm v.

[11] U.S. Steel argues that Howard's "allegations and conspiracy theories are nothing more than a continuation of the series of lawsuits he has filed in the United States District Courts, for which he has been admonished and prohibited from continuing in the federal courts." Appellee's Brief at 13. U.S.

Uhl, 815 N.E.2d 1015, 1019 (Ind. Ct. App. 2004) (holding that an award of appellate attorney fees was not warranted).

U.S. Steel also argues that it is entitled to receive appellate attorney fees due to Howard's procedural bad faith. Procedural bad faith "is present when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." Wallace, 765 N.E.2d at 201. U.S. Steel argues that Howard's brief violates several provisions of the Appellate Rules. Specifically, U.S. Steel argues that Howard failed to consecutively number the pages of his Appendix, failed to support his statement of facts, failed to provide his statement of facts in narrative form, and failed to provide cogent argument with appropriate citations. We have already noted that while Howard numbered some of the pages in his appendices, he failed to consecutively number all of the pages in his appendices. Howard's statements of facts contain some citations to the record. Howard's briefs contain citations to authority to support his argument. We cannot say that Howard's brief is written in a

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Steel states that Howard's "previous lawsuits each made similar allegations against [U.S. Steel], and each was dismissed because the lawsuits were frivolous. (U.S. STEEL App. pgs. 31-32; 46-58)." Id. at 4. The only reference to a nuisance claim in the pages cited by U.S. Steel comes from a deposition of Howard, in which he admits that he had previously brought a "[n]uisance" claim against U.S. Steel, which was found frivolous. Appellee's Appendix at 32. However, the record does not reveal whether the nuisance claim that was previously brought was a noise nuisance claim similar to Howard's most recent complaint, which alleged noises beginning in 2004. Thus, we cannot say that Howard's claim on appeal was previously alleged in federal court.

manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Thus, we conclude that an award of appellate attorney's fees is not appropriate here. See, e.g., Graycor Industrial v. Metz, 806 N.E.2d 791, 801 (Ind. Ct. App. 2004) (holding that the appellee was not entitled to appellate attorney fees even though the appellant's brief did not appropriately conform to the appellate rules, did not set out the facts in accordance with the standard of review, set out facts incorrectly, and based arguments upon less than a full consideration of the evidence presented at the hearing), trans. denied.

For the foregoing reasons, we affirm the trial court's grant of U.S. Steel's motion for summary judgment, and we deny U.S. Steel's request for appellate attorney fees.

Affirmed.

MATHIAS, J. concurs

KIRSCH, J. concurs in part and dissents in part with separate opinion

IN THE
COURT OF APPEALS OF INDIANA

DAVID L. HOWARD,	)	
	)	
Appellant- Plaintiff.,	)	
	)	
vs.	)	No. 45A05-0603-CV-144
	)	
U.S. STEEL CORPORATION,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Special Judge
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KIRSCH, Judge, concurring in part and dissenting in part.

Going in disguise by means of one or more satellite and other invasive technologies and fix-focusing such technologies upon the appellant *ad hominem*? Invoking the doctrine of *res ipsa loquitor* to disguise the invasion of the appellant's

privacy? Using invasive technology to lower the appellant in the estimation of his family, friends and society by making him the scapegoat, shill or victim of no resort? Knowing that some device, implant scheme, or artifice enables racially or otherwise invidiously select persons to receive transmitted data and conspiring to exclude the appellant from such transmitted data and invade his privacy, again, *ad hominem*? Knocking the appellant unconscious while he drove his automobile by using invasive technology?

If these are not the makings of a frivolous lawsuit, I do not know what a frivolous lawsuit is. If, as I believe, they constitute a frivolous lawsuit, then the appeal from the summary judgment dismissing that lawsuit is equally frivolous. I would grant U.S. Steel Corporation's request for appellate attorney fees. Doing so reimburses the appellee for the substantial expenses it has incurred in defending this appeal and discourages the appellant and others from bringing such claims in the future.

I concur in the decision of the majority to affirm the summary judgment, but I respectfully dissent from its decision to deny appellate attorney fees.